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# Final report: Review of the Ontario New Home Warranties Plan Act and the Tarion Warranty Corporation

In November 2015, Ontario:

- initiated an independent review of the *Ontario New Home Warranties Plan Act* and the Tarion Warranty Corporation
- appointed the Honourable J. Douglas Cunningham Q.C., to conduct the review.

This is Justice Cunningham's final report with recommendations.

## Background

In November 2015, Ontario's Minister of Government and Consumer Services (minister) appointed me to examine and make recommendations regarding the Tarion Warranty Corporation (Tarion) and the new home warranty program it administers. On July 22, 2016, I submitted my Interim Progress Report to the minister. That report identified key concerns, based on my review of Ontario's program and experiences in other jurisdictions, and through my consultations with interested parties and written submissions received. It also set out potential options to address those concerns. The eight key areas of focus were:

1. Tarion's role and business model
2. the dispute resolution process for new home buyers and owners
3. consumer education
4. warranty coverage and duration
5. regulation of builders and vendors
6. board governance
7. accountability, transparency and oversight
8. other related issues.

In this Final Report, I present recommendations on how to reform new home warranty legislation and the delivery of programs under that legislation to best serve Ontario's new home buyers and owners, the builders who build those homes, and others involved in the home building industry. This report addresses broad concerns about the best overall model for delivering new home warranty protection, builder and vendor regulation, dispute resolution, and rule-making, as well as specific questions about program content and process <sup>[1]</sup>.

For ease of reference, I have structured this report, including my recommendations, to align generally with the eight key areas of focus of my Interim Report. The focus of this report is on the structural context within which new home warranty protection is defined and delivered. Tarion has been operating within the structural framework provided for in the *Ontario New Home Warranties Plan Act* (Act). My recommendations suggest a very different structural framework to better meet the objectives of this important consumer protection legislation.

## Note of appreciation to participants

This report and this review have been enriched by input from many organizations and individuals. Many people gave generously of their time, speaking of both their personal and professional experiences and providing constructive and thoughtful suggestions on how the new home regulatory regime might be improved.

I met with many individuals through focus groups, town halls and individual meetings and spoke with others by telephone.

I received written submissions from individuals and organizations and associations through the Tarion Review email account and directly <sup>[2]</sup>. These submissions were generally thorough and thoughtful. Writers took the time to inform themselves of how warranty programs are operating in other jurisdictions, to canvass the opinions of others and advance concrete suggestions for change. For these efforts and input I am very grateful.

Likewise, I want to thank the many organizations that shared their time and expertise on one or more of the issues being discussed, including staff and members of several regulators and industry and consumer associations <sup>[3]</sup>. There is much to be learned from the experiences of others.

I also want to thank Tarion's senior management team, staff, and Board of Directors for their input into this review. I was impressed with their dedication and commitment to consumer protection. Tarion delivers a challenging mandate. The environment in which it must operate has become increasingly complex, while the Act has remained almost unchanged since 1976. Despite this it has been proactive in responding to changes and continuously improving the new home warranty program.

## Challenges with Ontario's new home warranty program

Ontario's mandatory new home warranty program was established in 1976. The basic structure of the warranty program and how it is delivered has not changed in 40 years. Tarion has made efforts to keep the warranty protection coverage current and deliver value to new home buyers and builders. There have been improvements to the warranty program during that time and in some respects Ontario is a leader in new home warranty protection relative to peers across Canada and the U.S. I have observed that there have been steady enhancements to the warranty over the years. As one key example, Tarion developed the Construction Performance Guidelines, an important document in warranty assessment decisions that has served as a model for other jurisdictions. Nonetheless there are fundamental problems with the current program and delivery structure that should be addressed.

I believe that many of the challenges flow from Tarion's multiplicity of functions, including its dual role of regulator and warranty provider. As a result, multiple stakeholders lack confidence in the processes in place today, and have strong concerns about the current system's perceived and real ability to protect consumers.

I have identified a variety of challenges with how new home buyers and builders are served by Ontario's current new home warranty program, and with how new home builders are regulated:

- Tarion's dispute resolution is not always as accessible or effective as it could be
- consumer information and education is not as helpful or effective as it could be in explaining home maintenance, terms of warranty coverage, how to navigate the claims process and what can be expected with new construction
- changes to warranty protection are developed by Tarion through processes that are ad hoc and not as transparent and consultative as they could be
- builder and vendor regulation is not consistent with modern approaches to consumer protection regulation
- and governance measures intended to provide accountability, transparency and oversight are not aligned with modern and current best practices.

New home warranty is just one part of a much broader and complex framework for new home construction. There can be challenges in linking the roles and responsibilities of different participants in the new home construction sector. Linkages among sector participants should be strong with information sharing and other

protocols in place. I believe the structural changes I am recommending provide an opportunity to enhance the coordination of efforts between the warranty and builder regulation sectors and municipal partners including the Ministry of Municipal Affairs, municipalities, and building officials. These parties share a common interest in supporting consumer protection and high quality building that can be supported with strong linkages and coordination of efforts across the new home building sector.

Tarion has adopted an approach of continuous improvement. I have incorporated several of Tarion's suggestions for improvement in my recommendations. Structural change will take time to implement. Pending changes in response to my recommendations, I would strongly recommend that Tarion continue with the opportunities for improvement it has identified in its 2015 Annual Report <sup>[4]</sup> and elsewhere, for example, building on its enhancements to the builder registration requirements. Some of my recommendations do not depend on legislation and could be implemented operationally in the short term such as improvements to the builder directory. Regarding the current dispute resolution process, Tarion should continue to improve the process through implementation of changes recommended by Ms. Chornenki <sup>[5]</sup> (the independent, third party dispute resolution expert hired by Tarion to review its process) and accepted by Tarion.

## Guiding objectives

The following objectives have guided me in making my recommendations on the structural framework generally and on specific matters. These objectives provide clear outcomes and should be reflected in the home warranty legislation and its implementation.

I am proposing two overriding objectives for the new home warranty sector going forward:

1. Consumer Protection: Deliver strong new home warranty protections for new home buyers and owners;
2. Building Quality: Promote high quality residential construction in Ontario and continuous quality improvement;

These two objectives are supported by six additional objectives:

1. Accountability and Transparency: An appropriate level of accountability to government and transparency to the public;
2. Public Confidence: Organizational structures and processes that drive effective, efficient and fair outcomes and appropriately manage real and perceived conflicts of interest;
3. Modern Dispute Resolution: A dispute resolution process for warranty claims that reflects current best practices, is accessible, timely and fair, and accounts for the imbalance in knowledge and expertise that exists between a builder or warranty provider and the homeowner;
4. Inclusive Rule-making and Standards Setting: Warranty terms and other rules and standards affecting home builders and homeowners are developed through processes that are inclusive, transparent and accessible;
5. Modern Regulator: Strong compliance and enforcement tools and practices to regulate the industry are in place and effectively applied by the regulator; and,
6. Efficient: The new home warranty program is efficient and effective with clear roles and accountabilities for all parties.

## Summary of Key Recommendations

A program intended to support the building of high quality homes and deliver new home warranty protection for consumers has four essential functions:

1. Making rules regarding mandatory warranty protections;
2. Administering the warranty program;
3. Adjudicating disputes about those rules; and,

#### 4. Regulating builders and vendors.

Under the Act, Tarion is responsible for all four functions. This approach is unique, at least in Canada, as no other jurisdiction I examined has one organization responsible for all functions. I believe that this multiplicity of roles, at a minimum, gives rise to a perception of conflict of interest and can also result in actual conflicts of interest.

At an executive level, the structure of having the same leadership team responsible for the rules of the monopoly warranty program, financial management of the program, dispute resolution and builder regulation will inevitably give rise to situations where financial objectives compete with other objectives such as consumer protection. At an operational level, there is potential for conflict when the same person receives a claim, investigates it, attempts to assist the parties in resolving the claim and then sits in judgment on the claim if not resolved. <sup>[6]</sup> While Tarion has worked hard to build internal controls to mitigate this conflict, I believe that current controls do not adequately respond to these challenges in a manner that can achieve the objectives outlined above. I do not believe that this problem and the challenges I have identified can be adequately addressed in the current model without significant and structural changes to the new home warranty sector in Ontario (See Appendix A - Recommended Delivery Model).

Proposed Framework – a mandatory new home warranty program delivered through a competitive multi-provider warranty system, with a separate builder/vendor regulator, independent adjudication of warranty disputes, and rule-making subject to government approval

**New home warranty protection** should continue to be a mandatory program. Warranty coverage would move from today's monopoly, with Tarion as the only provider, to a multi-provider insurance system. The warranty coverage should be an insurance product. Some private sector insurance companies have expressed interest in participating as warranty providers should a competitive market replace today's monopoly structure. Delivering warranty protection as an insurance product would facilitate participation by private sector insurance companies and introduce financial sector oversight and accountability. An insurance based, multi-provider model exists in British Columbia, Alberta and Saskatchewan and several international jurisdictions.

A new not-for-profit corporation would assume responsibility for managing the warranty for existing homes enrolled with Tarion and could participate as a warranty provider in the new competitive model. Some builders, vendors and homeowners may welcome the option of being able to continue to deal with a not-for-profit alternative.

**Builder and vendor regulation** should be delivered through an administrative authority operating separate from, but in cooperation with, the warranty providers. The current outdated approach to builder and vendor regulation should be updated and aligned with modern practices for sectors regulated through a registration/licensing model.

**Adjudication of unresolved warranty disputes** should be delivered through a separate organization independent of warranty providers and the regulator. Warranty providers would continue to have a role to facilitate the resolution of disputes between homeowners and builders. They would also have responsibility to assess and decide on warrantability where agreement is not reached between a builder and homeowner. A homeowner who is not satisfied with a decision could appeal that decision to the independent adjudication body, through a process that is accessible and easily navigated by the homeowner.

**Rule-making on warranty coverage** should be subject to greater government oversight. The government should have final approval on changes to warranty coverage and duration, and changes to standards that apply to builder/vendor registration. The processes for updating warranty coverage and duration, and standards for builder/vendor registration should be more regular, structured and inclusive. While government should make the final decisions, it should base those decisions on the advice developed through robust review processes that fully engage the expertise and knowledge of the new home construction sector and consumers.

The remainder of this report sets out specific recommendations relating to these four structural pieces. I also provide recommendations on other matters related to warranty program delivery and content, including consumer education and “illegal building”. I believe that the changes I am proposing will strengthen protections for new home buyers and owners, and promote high quality residential construction in Ontario.

Updated: May 6, 2023

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## Footnotes

- [1] ^ Throughout this Final Report I will refer to builders and vendors. The *Ontario New Home Warranties Plan Act* requires that both builders and vendors be registered. The vendor and builder may be the same person but not always. The contract to purchase a new home is made with the vendor. And while the Act imposes several conditions and restrictions on builders, it is the vendor who warrants to the owner that the home is constructed in a workmanlike manner and is free from defects, is fit for habitation, and constructed in accordance with the Building Code; is free of major structural defects; and any other warranties that may be prescribed in the regulations. Section 17 of the Act speaks in terms of conciliation of disputes “between the owner and a vendor.” However, in fact, it is the builder that most home owners and Tarion deal with when there is a warranty dispute. I have referred to the builder or builder/vendor in this Final Report for ease of reference.
- [2] ^ See Appendix D for a list of written submissions from organizations.
- [3] ^ These included LAWPRO (the insurance provider for lawyers and paralegals), the Canadian Motor Vehicle Arbitration Plan (CAMVAP) and the Safety, Licensing Appeals and Standards Tribunals Ontario (SLASTO) a cluster of adjudicative tribunals that includes the Licence Appeal Tribunal (LAT).
- [4] ^ Tarion 2015 Annual Report. Web. 4 December 2016. <http://annualreport2015.tarion.com/online-version/page/10> (<http://annualreport2015.tarion.com/online-version/page/10>).
- [5] ^ Chornenki, Genevieve. Independent End-to-End Dispute Resolution Process Review. Web. 4 December 2016. <https://www.tarion.com/About-Tarion/Documents/Report.pdf> (<https://www.tarion.com/About-Tarion/Documents/Report.pdf>).
- [6] ^ As far back as 1996, there has been discussion about the function of the regulator and monopoly status of the warranty provider. See: Strategies for Change: *Ontario New Home Warranties Plan Act* Proposals for Legislative Change. October 1996. Aubrey L. LeBlanc President/Registrar.